## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### Opinions Below.

The opinion below of the Circuit Court of Appeals is reported and appears in the record as shown on page 2 of this Petition. The opinion of the District Court is unreported and appears in the record as shown on page 2 of this Petition.

### II.

### Jurisdiction.

The Decision of the Circuit Court of Appeals and its Order affirming Judgment was filed June 16, 1944.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (Sec. 347 of Title 28 USCA).

### III.

### Statement of the Case.

A summary statement of the case is contained in pages 3 to 5 of the Petition filed in this case.

### IV.

### Specification of Errors.

The Circuit Court of Appeals erred:

(1) In holding that it was a question of fact for the jury to determine whether the driver of the truck was guilty of negligence and whether the respondent's

deceased husband was guilty of negligence in making this left turn.

(2) In holding that the Trial Court did not err in failing to charge the jury on the doctrine of proximate cause.

(3) In holding that the Trial Court did not err in charging the jury under the law of Pennsylvania that it was the duty of the truck driver to stop and allow the deceased husband to proceed.

## V.

## Argument.

THE DECISION IN THIS CASE THAT IT WAS A QUESTION OF FACT FOR THE JURY AS TO WHETHER THERE WAS NEGLIGENCE OR CONTRIBUTORY NEGLIGENCE IS IN CONFLICT WITH OTHER CIRCUIT COURTS OF APPEAL AND WITH DECISIONS OF THIS COURT.

It is our opinion that the reasoning of the Lower Court in refusing judgment for the petitioner is clearly erroneous and contrary to the law of State and Federal Courts. For convenience we quote the portion of the opinion of District Judge Kalodner, who wrote the opinion in the United States Circuit Court of Appeals in this particular case:

> "Considering first defendant's motion for judgment n.o.v. we are of the opinion the trial judge was justified in denying it. Considering the evidence in a light most favorable to the plaintiff, we cannot say as a matter of law that the deceased was contributorily negligent, nor that defendant's conduct was not the proximate cause of the accident. It is a jury question whether it is negligence to at-

tempt a left turn at twenty miles per hour in the face of oncoming traffic over 100 feet distant travelling at 40 miles per hour. *Even granting the deceased made a mistake in turning to the right to avoid the collision, such mistake cannot bar recovery unless the emergency was created by the deceased's negligence.* Miller v. Southern Asphalt Co., 171 A. 472, 314 Pa. 289 (1934); Brennen v. Pittsburgh Rys. Co., 323 Pa. 81, 86 (1936); Restatement, Torts, sec. 296. As we said, whether deceased's conduct did give rise to the emergent situation is a question for the jury. *Moreover, it is true, as the trial judge pointed out, that there is a presumption the deceased exercised due care for his own protection.* Johnson v. Hetrick, 300 Pa. 225, 229 (1930); Kriesak v. Crowe, 44 F. Supp. 636, affd. 131 F. (2d) 1023 (C.C.A. 3, 1942)." (Italics ours.)

The Court apparently was of the opinion that the deceased made a mistake in turning to the right to avoid a collision, and this definitely was the petitioner's argument throughout all of the proceedings in this case. The Circuit Court opinion, however, holds that "such mistake can not bar recovery unless the emergency was created by the deceased's negligence." We do not believe this is the law. We believe that the deceased may well have started to make a left turn, which would be a safe left turn, and a turn without negligence, but that when he then turned back to the right, this was the negligent act which defeated his recovery. The cases cited in the Court's opinion are not authority for the proposition as stated, since these cases merely state that such mistake can not bar recovery unless the emergency was created by the deceased's action. IT HAS BEEN OUR POSITION THROUGHOUT ALL OF THE PROCEEDINGS THAT THE

DECEASED PROPERLY STARTED TO TURN OFF THE ROAD AND IF HE HAD CONTINUED THAT PATH THERE WOULD HAVE BEEN NO ACCIDENT. However, when suddenly he decided to go back to the right side of the road, when the petitioner's vehicle had already turned to go behind him, that was the act that created the accident, and that was the negligence that produced the result.

Moreover, we suggest that the opinion in the Circuit Court is based upon the second error, that is, that "there is a presumption that the deceased exercised due care for his own protection." There is no presumption under any law or under any cases pertinent to the facts herein that will corroborate such conclusion. If the respondent's own witnesses had not given us all of the testimony in this case and had not described the accident as herein stated, this statement might be true. BUT WHEN THE RESPONDENT'S OWN WITNESSES DESCRIBED THE ACCIDENT AS HEREIN STATED, THERE WAS DEFINITE EVIDENCE AS TO HOW IT OCCURRED, THERE WAS DEFINITE EVIDENCE OF THE NEGLIGENCE OF THE DECEASED, AND THERE CAN BE NO PRESUMPTION IN THE FACE OF DEFINITE EVIDENCE OFFERED BY THE RESPONDENT HERSELF.

This rule is definitely set forth in the case of *Miller v. Union Pacific Railroad Co.*, 290 U. S. 227:

(p. 233)

> "If, as here, there be no evidence which speaks one way or the other with respect to contributory negligence of the person killed, it is presumed that there was no such negligence. Looney v. Metropolitan R. Co., 200 U. S. 480, 488."

To the same effect is the case of *Rich v. Chicago M. & St. P. Ry. Co.*, 149 Federal Reporter 79:

(pp. 84 and 85)

"Counsel for plaintiff recognizes the foregoing well-settled rules, and in indeavoring to exculpate the decedent from the charge of contributory negligence urge that the instinct of self-preservation is so strong as to create a presumption evidential in its character that the decedent was in the exercise of due care, and that that presumption was sufficient evidence to take the case to the jury. The presumption referred to is like other presumptions of fact. It is available in cases where there is an absence of evidence showing the actual occurrence but like other presumptions it ceases in the light of actual facts. We recognize its evidential value in the former class of cases, as illustrated by Texas & Pac. Ry. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186, and Northern Pac. Ry. Co. v. Spike, 57 C. C. A. 384, 121 Fed. 45, but this court on repeated occasions has recognized and enforced limitations attending its use.

"In Tomlinson v. Chicago, etc., Ry. Co., 67 C. C. A. 218, 134 Fed. 233, 234, it is said that:

'The presumption cannot stand against positive and uncontradicted proof such as was presented in this case, that had he taken those precautions which the law required of him he could plainly have seen the approach of the train in time to avoid the danger. * * * The presumption of the exercise of due care is at variance with the physical facts.'

"In Rollins v. Chicago, etc., Ry. Co., 71 C. C. A. 615, 139 Fed. 639, it is said:

'The presumption that the deceased used due

care is destroyed by the force of physical facts shown by uncontradicted evidence, * * *' etc.

"In Wabash R. Co. v. De Tar, 73 C. C. A. 166, 141 Fed. 932, 934, it is said:

'Because the natural instinct of self-preservation generally prompts men to acts of care and caution when approaching or in the presence of danger, there is, in the absence of credible evidence of the actual fact in any instance, a presumption of the exercise of due care and caution. * * * But it is a presumption of fact, not of law, and, like other presumptions arising from the ordinary or usual conduct of men, rather than from what is invariable or universal, it is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it.' "

In *Heath v. Klosterman,* 343 Pa. 501, 23 Atl. (2d) 209, the Court in an opinion by Mr. Justice Drew held as follows:

(p. 503)

"Even though Doctor Heath is dead and ordinarily a presumption might arise that he exercised due care, this presumption is destroyed in the instant case by the testimony adduced by plaintiff. As held in Watkins v. Prudential Ins. Co., 315 Pa. 497, a presumption such as this is not evidence, and it cannot be weighed as evidence, since it gives way the moment proof to the contrary is presented. This conclusively appeared in the presentation of plaintiff's own case, for the evidence established that Doctor Heath did not look. Moreover, the acci-

> dent having happened in broad daylight, he must have seen the trucks had he looked before stepping out. There can be no presumption as against facts which are proven. In Start v. Fullerton T. Co., 318 Pa. 541, 544, it was said: 'It may be conceded that ordinarily decedent's death would raise a presumption that he had taken all necessary precautions for his own safety, but this presumption has no existence as against the certainty that if he had done so here he would not then have died.' "

From the above, therefore, we find that the Court's opinion is based upon two errors of law and we do not believe that a decision of this importance should be allowed to stand based upon such erroneous statements of the law.

Moreover, the decision is in conflict with the decisions of this Court and the decision of other Courts of Appeal in similar cases. It is readily apparent from the evidence and the photographs offered in evidence by the respondent that the sole and proximate causé of the accident was the operation of the car by Dubrock. There could have been no accident if Dubrock had been watching the road ahead of him and had continued to proceed to his left off the road which had been opened for him by the petitioner's driver. The sole and proximate cause of the accident was the sudden turn by Dubrock to his right from a partially complete left turn into the center of the road when the two vehicles were twenty to forty feet apart when he could have safely proceeded into north lane.

In the case of the *Atlantic Coast Line Railroad Company v. Driggers,* 279 U. S. 787 (1928), it was held as follows:

(p. 792)

"The rate of speed at which the passenger train was running was, plainly, not a proximate cause of the injury, as the engine of that train did not run into Driggers, but he, as the result of his own action, was thrown against the side of the engine as it was passing. See Patterson v. Director General, 115 S. C. 390, 396."

To the same effect is the case of *Southern Railway Co. v. Walters,* 284 U. S. 190 (1931), 52 Supreme Court 58:

(p. 194)

"There is no proof whatever that the alleged failure to stop before entering the crossing was the proximate cause of the plaintiff's injury. Such direct testimony as there is on his behalf indicates a collision between him and the side of the train after the front part of it, which in this case was the rear end of the tender, had passed him, and all of the evidence both for plaintiff and for defendant is consistent with this view of what happened. It is clear that on this ground also a binding direction in favor of the defendant should have been given."

The case of *Warren v. Haines,* 126 Fed. (2d), 161, Circuit Court of Appeals for the Third Circuit, is in our opinion controlling in the case at bar. The Court there held as follows:

(p. 161)

"The plaintiff's husband was killed in a collision between the Pontiac which he was driving and a milk

truck owned by the defendant and operated by his employee. The collision occurred between 6:30 and 7 o'clock on the morning of August 18, 1939. The Pontiac was travelling in a westerly direction and the milk truck in an easterly direction on State Highway No. 28 near the town of North Branch in New Jersey. There is a curve in the road at Burnt Mills Road but at the time of the collision the Pontiac had gone about 250 feet past the curve and the truck had not reached it. The accident took place on the straight-away. At the place of the accident the concrete pavement of the road is 30 feet wide and is divided by a white center line into two 10 feet sections. The milk truck was eight feet wide. A witness for the plaintiff testified that a few seconds before the collision the truck was two feet in from the edge of the road. Asked to give a physical demonstration of the distance he indicated somewhat more than three feet. Assuming the physical demonstration to represent the actual distance, the left wheels of the truck must have been approximately one foot over the white center line. The law of the road requires drivers to keep to the right of the center of the road. The New Jersey statute is in conformity with this rule. The truck was travelling at a speed between 40 and 45 miles an hour. The permissible statutory speed is 20 miles an hour. In our consideration of the case we have not only accepted the testimony that the truck was three feet from the edge of the road and thus partially over the center line, but have also accepted as a reasonable inference therefrom that there was no change in its position relative to the center line

within the few seconds which elapsed from the time the witness first saw the truck until the collision.

"Violations of traffic statutes may be considered by the jury in determining whether the defendant was negligent. Proof of the defendant's negligence is not sufficient, however, to justify a verdict for the plaintiff. There must be evidence that the defendant's negligence was the determinative or proximate cause of the injury. Such a finding in the present case would be based wholly upon speculation or caprice. According to the plaintiff's evidence her deceased husband had all but one foot of his own ten feet wide section of paved road upon which to operate his Pontiac. There is nothing to show that his vision was obstructed or that his side of the road was crowded by other vehicles. There is no evidence that the defendant's truck cut into the path of the Pontiac. Indeed the proof as to the points of contact between the two vehicles and the consequent damages to each of them might well lead one to conclude that the Pontiac cut across the path of the truck. Since the plaintiff has failed to prove any causal connection between the defendant's negligence and the death of her husband it follows that the judgment of dismissal was proper."

The decision is also in conflict with the decisions of the Supreme Court of Pennsylvania under similar circumstances. In the case of *Davidonis, et al, v. The Philadelphia Gas Works Co.*, 347 Pa. 314 (32 Atl. (2d) 304), it was held that there was no liability on the operator of a truck which struck a pedestrian who, having crossed in front of the truck, suddenly turned and

walked into the path of the truck. The Court there held as follows:

(p. 315).

> "There is no evidence here of negligence upon which any liability of defendant can be based. Richard testified that when he first saw the truck it was about fifty feet from Charles. The latter was then within a foot of the rail walking north and had cleared the pathway of the truck; at least there is no evidence to the contrary, and if the fact were otherwise the burden was upon plaintiff's to establish it. When Charles, in response to Richard's call, started back, the truck must have been even less than fifty feet away. The operator had no reason to anticipate that the boy would suddenly retrace his steps."

THE DECISION OF THE CIRCUIT COURT THAT A CHARGE OF NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE CONSTITUTED A CHARGE ON THE DOCTRINE OF PROXIMATE CAUSE IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

There is nothing more definitely settled by the decisions of this Court and the Circuit Courts of Appeal than the question that in order for negligence to be actionable it must be the proximate cause of the accident. Yet the Trial Judge, although specifically requested to charge on the doctrine of proximate cause, refused to so charge but merely charged on the negligence and contributory negligence, which is entirely different from that requested, and it is readily apparent under the facts in this case that the question of proximate cause was the controlling element in the case. This Court held

in the case of *Milwaukee and Saint Paul Railway Company v. Kellogg,* 94 U. S. 469 (1876), as follows: (p. 474).

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact in view of the circumstances attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, as in the oft-cited case of the squib thrown in the market place, 2 Bl. Rep. 892, the question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that the negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

The rule is very definitely laid down by numerous decisions of Circuit Courts of Appeal, some of which are as follows:

*Chicago Great Western Ry. Co. v. Price,* 97 Federal Reporter 423, Circuit Court of Appeals for the Eighth District:

(p. 430)

"The question whether or not the negligence of the company was the proximate cause of the death of Price was rightfully submitted to the jury."

*Shugart v. Atlanta R. & N. Ry.,* 133 Federal Reporter, 505 (1904).

"It may be conceded that unless this alleged bad condition was a proximate cause of the derailment plaintiff had no case, and the deduction was right. Negligence which does not cause or contribute to an injury is nonactionable. But proximate cause is a question of fact, and a question for the jury if there is substantial evidence from which it may reasonably be deduced that the negligence shown was a proximate cause of the injury complained of."

The question has been definitely passed upon by the Circuit Court of Appeals for the Third Circuit in the case of *Warren v. Haines,* 126 Fed. (2d) 161

(p. 162)

"Proof of the defendant's negligence is not sufficient, however, to justify a verdict for the plaintiff. There must be evidence that the defendant's negligence was the determinative or proximate cause of the injury. Such a finding in the present case would be based wholly upon speculation or caprice.

**THE DECISION IN THIS CASE WITH REGARD TO THE DUTY OF THE DRIVER OF THE TRUCK TO STOP IS IN CONFLICT WITH THE STATUTE OF PENNSYLVANIA.**

The statute dealing with this question and upon which the Trial Court attempted to justify its charge that it was the duty of the driver of the truck to stop and allow Dubrock to proceed is as follows: Act of 1929, P. L. 905 Article 1013.

> "(b) The driver of a vehicle, street car, or trackless trolley omnibus, approaching but not having entered an intersection, shall yield the right of way to a vehicle within such intersection or turning therein to the left across the line of travel of such first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn as required in this act."

There is no case in Pennsylvania which holds that the words "yield the right of way" necessarily mean to stop. It is readily apparent that the driver of the truck did yield the right of way and had entirely cleared the northerly lane for Dubrock to proceed. Certainly on a three lane highway the driver of a truck who sees a car approaching and making a left turn is yielding the right of way when he swings to the left and opens up the lane of traffic into which the other car is proceeding. This is a common and everyday occurrence.

The Trial Judge certainly was placing upon the petitioner a duty in the operation of the tractor and trailer which the statute did not place upon it; and since the truck did not stop, the Trial Judge was instructing the jury that the petitioner was negligent.

**CONCLUSION.**

For the foregoing reasons it is submitted that a Writ of Certiorari should issue to the Circuit Court of Appeals for the Third Circuit.

J. ROY DICKIE,
*Attorney for Petitioner.*

H. E. McCamey
Dickie, Robinson & McCamey
2415 Grant Building
Pittsburgh (19), Pa.
*Of Counsel.*